HON'BLE SHRI G.S. SINGHVI, THE CHIEF JUSTICE

AND

HON'BLE SHRI JUSTICE G. BHAVANI PRASAD

WRIT APPEAL NO. 71 OF 2006

BETWEEN

M.A. Waheed & others

.....Appellants

And

Municipal Corporation of Hyderabad & others

.....**Respondents**

:: JUDGMENT ::

Counsel for the Appellants : Shri P. Venu Gopal

Counsel for Respondent Nos.1 to 3 : Smt. G. Jyothi Kiran

Counsel for Respondent Nos. 4 and 5 : Neeraja Sudhakar Reddy,

Government Pleader for

Higher Education

Dated: 28-02-2006

Per G.S. SINGHVI, CJ

This is an appeal for setting aside order dated 13.12.2005 passed by the learned Single Judge in Writ Petition No. 25271 of 2005 whereby he rejected the appellants' challenge to the construction being made in the compound of Government Degree College for Women, Begumpet, Hyderabad (respondent No. 5).

A perusal of the record shows that Writ Petition No. 21663 of 2004 filed by the appellants for restraining respondent No. 5 from raising construction without getting the plan sanctioned from the competent authority of the Municipal Corporation was dismissed by the learned Single Judge on 05.09.2005 by recording the following observations:

> "After hearing the counsel for both the parties, an order came to be passed by this Court on 04-07-2005 and it reads as follows:
>
> > "Heard the learned counsel for the petitioners and the Government Pleader for Higher Education.
> >
> > The grievance of the writ petitioner is that the fifth respondent is proceeding with construction without leaving a space of 13.3 feet on the northern side of his building. Whereas in the counter-affidavit filed on behalf of fifth respondent, it is stated that 13.3 feet space is left towards the house of the petitioner.
> >
> > The dispute between the petitioners and the fifth respondent is whether the fifth respondent is proceeding with the construction leaving a space of 10 feet or not.
> >
> > In such circumstances, I deem it appropriate to direct the third respondent to inspect the premises of the petitioner as well as the fifth respondent and submit a report as to whether the proposed constructions by

> the fifth respondent is by leaving 10 feet space towards the side of the writ petitioners' house and submit a report."

In pursuance of the said order, the Chief City Planner, Municipal Corporation of Hyderabad, inspected the premises and submitted a report. Para 2 of the report reads as follows:

> "Accordingly, the Assistant City Planner, Secunderabad Division along with the concerned Section Officer inspected side and have taken measurements as directed by the Hon'ble Court on 13-07-2005, in the presence of the petitioners and fifth respondent. The Assistant City Planner prepared a statement of inspection and obtained the signatures of the petitioners and fifth respondent. As per the inspection statement, the fifth respondent maintained 13'.3" to 15'.0" open space i.e. side setback towards writ petitioner's side and at present there is no construction work at site. The statement of Assistant City Planner, Secunderabad is hereby submitted."

Heard the learned counsel for the petitioners and the learned standing counsel appearing for the respondents 1 to 3 and the learned Government Pleader for Higher Education appearing for the respondents 4 and 5.

The learned counsel for the petitioners submits that the fifth respondent is proceeding with the construction without obtaining permission and without leaving setbacks as provided under the Building Rules.

It is brought to my notice by the leaned counsel for the respondents 4 and 5 that the Municipal Corporation has granted necessary permission.

Such is the situation, the first point urged by the petitioners has no merit. With regard to second point, the report of the Chief City Planner, Municipal Corporation of Hyderabad, clearly reveals that fifth respondent maintained 13'.3" to 15'.0" open space i.e. side setback towards writ petitioners side. Therefore, the second contention also has no merit."

Immediately thereafter, the appellants filed Writ Petition No. 25271 of 2005 with the prayer to quash the permission accorded by respondent Nos. 1 to 3 to respondent No. 5 on the ground that the same is ultra vires to G.O.Ms.No.423

M.A., dated 31-07-1998. The second writ petition was dismissed by the learned Single Judge, who, after going through the files produced by the counsel representing Municipal Corporation, Hyderabad, concluded that the permission was in consonance with the Government Orders.

Shri P. Venu Gopal, learned advocate for the appellants, invited our attention to the averments contained in the counter-affidavits filed on behalf of respondent Nos. 1 to 3 and respondent No. 5 and made detailed arguments to show that the relaxation granted by the concerned authority of the Municipal Corporation in favour of respondent No. 5 is contrary to the conditions incorporated in G.O.Ms.No. 483 M.A., dated 24-08-1998. Learned counsel emphasized that without examining the issue relating to legality of the relaxation granted by respondent Nos. 1 to 3, the learned Single Judge could not have recorded a finding that the permission granted to respondent No. 5 for construction of the building was legally correct.

Learned counsel for the Municipal Corporation fairly admitted that copy of the proceedings vide which relaxation was granted in favour of respondent No.5 was not placed on the record of the writ petition and the learned Single Judge disposed of the case after perusing the other records.

We have thoughtfully considered the entire matter and carefully perused the affidavits filed by the parties. There can be no doubt that a writ petition filed under Article 226 of the Constitution of India against the action taken by the State or its instrumentalities can be summarily dismissed if the petitioner fails to show violation of any legal or constitutional rights or arbitrariness in the impugned action. However, in the facts of this case, we are convinced that the learned Single Judge committed an error by dismissing the writ petition without even requiring the Municipal Corporation to file counter-affidavit. In our considered opinion, the learned Single Judge ought to have directed the respondents to file counters and then decided the issue raised by the petitioners (appellants herein) on the legality of the relaxation granted by the competent authority of the Municipal Corporation and the consequential permission accorded to respondent No. 5 for raising construction on the

disputed site.

We have carefully perused the contents of G.O.Ms.No.423 M.A. dated 31-07-1998 and other documents produced by the parties. At this stage, we do not consider it just and proper to pronounce on the merits and demerits of the contention of the learned counsel for the appellants that relaxation granted by the competent authority is ultra vires to the aforementioned G.O.Ms., but are convinced that the issue deserves a more detailed consideration by the learned Single Judge.

In the premise aforesaid, the appeal is allowed. The order of the learned Single Judge is set aside. Writ Petition No. 25271 of 2005 shall now be listed for fresh adjudication before the appropriate Single Bench. The appellants shall be free to make an application before the competent authority of the Municipal Corporation to supply a copy of the relaxation granted in favour of respondent No.5 and then amend the petition for quashing the order of relaxation. The respondents shall also be free to file their respective counters to contest the writ petition on all available grounds.

As a sequel to the disposal of the appeal, in the manner indicated above, W.A.M.P.No.141 of 2006 filed by the appellants is disposed of as infructuous. However, they shall be free to file appropriate application before the learned Single Judge.

G.S. SINGHVI, CJ

G. BHAVANI PRASAD, J

28-02-2006

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